



ARMY SAFE
IS ARMY STRONG



Legal Aspects of Accident Investigation

MAJ Jennifer Farmer
Command Judge Advocate

Terminal Learning Objective

Action: Determine pertinent legal issues affecting accident investigation

Condition: Given a scenario on the Accident Investigation exam

Standard: Student must achieve a minimum of 75% on the Accident Investigation exam

Risk Assessment

Risk Assessment Level: Low

Environmental Considerations: None

Evaluation: This lesson will be evaluated with a group practical exercise and questions on the Accident Investigation exam.

Lesson Topics

- Conducting the Accident Investigation
- Limited Use and General Use Reports
- Privileged Safety Information (and Freedom of Information Act (FOIA)/DoD Requests)
- Other Investigations

References

- DOD Instruction 6055.07, Mishap Notification, Investigation, Reporting, and Record Keeping (6/6/2011)
- AR 385-10, The Army Safety Program (11/27/2013)
- DA PAM 385-40, Army Accident Investigation and Reporting (RAR 2/25/2010)

Conducting the Accident Investigation

Conducting the Investigation

- Secure the accident site!
 - Ensure rescue efforts are complete
 - Coordinate with civilian law enforcement for security
- Off-post accident?
 - Jurisdiction
 - Posse Comitatus Act (1878) allows you to secure the accident site

Accident Site Photography

- Coordinate with your Public Affairs's Office (PAO)
- Do not prevent photos by media, unless classified material is present
 - 18 USC §§793d, 793e, 796 & 797
- Refer info requests/questions to PAO (AR 360-5)

Autopsy

- Armed Forces Medical Examiner (AFME)
 - AFME has authority to order autopsy
 - Mandatory autopsy on air-crew members of Army aircraft
- Civilian deaths – NOK consent required unless waived by law
- Deaths off-post – local coroner/ME has jurisdiction
 - DODD 5154.24 / AR 40-21 / AR 40-57 / AR 40-400

Witness Interviews

- No need for Art 31, UCMJ warning
- Jencks Act – 18 USC §3500(b)
 - Direct testimony v. investigator summary
 - No signed/adopted statements
 - Recording – render to written summary ASAP

Two Types of Accident Reports: Limited and General Use

Limited Use Accident Reports

- “Close hold, internal communications of the DOD whose sole purpose is prevention of subsequent DOD mishaps”
 - Flight & fratricide/friendly fire - **mandatory**
 - Complex weapons systems or military-unique items
- Frank and open exchange of information
- Promise of confidentiality

Limited Use Accident Reports

- Confidentiality
 - “These reports shall not be released in their entirety to the public or any Federal Agency outside of DOD” (§1-7.a.(4)(b))
- Used only for accident prevention purposes
- Documented in the report
- Information cannot be used in admin or disciplinary actions

General Use Accident Reports

- Used for all recordable DA accidents not covered by Limited Use Investigations
- Intended for accident prevention purposes as well
- Information cannot be used in admin or disciplinary actions within DOD
- Witness statements may be releasable (no offer of confidentiality)
 - Not used within DOD for discipline
 - May be releasable under FOIA

Privileged Safety Information

What Does “Privilege” Mean?

- Information is protected
- From what?
 - Release outside DOD
 - FOIA, Subpoena, discovery, etc.
- From whom?
 - Everyone ... *except*
 - May be released within DOD solely for accident prevention purposes

Purpose of the Privilege

- To promote conjecture
- To promote speculation
- To promote full and frank discussions by safety investigators and witnesses
- This, in turn, saves lives!

Privileged Information

- Confidential witness statements, to include direct reference within report
- Board findings/analysis/recommendations
 - Opinions
 - Causal factors
 - Animations if they incorporate analysis
 - Photographs & Diagrams (staged/reconstructed) if they incorporate analysis
- RMIS contains privileged information

Privileged Information

- Death-scene photographs
 - *NARA v. Favish*, 541 U.S. 157 (2004)
 - Vincent Foster, Jr. death
 - Next of Kin has a right to privacy of death scene photos

Summary of Privileged Information

- Board Findings
- Board Evaluations
- Board Analyses
- Board Opinions
- Board Conclusions
- Board Recommendations
- For DoD: ALL witness summaries
- For the public: only witness summaries obtained under promises of confidentiality (limited use accidents)
- Other indicia of the deliberative processes of a safety investigator, safety investigation boards, endorsers and reviewers (i.e., notes of board members)

What Information is NOT “Privileged”?

- Facts (such as those found in preliminary loss reports BUT NOT the How or Why!)
- Teardown and analysis reports from Army depots
- Command directed fitness for duty exams
- Official records on personnel or equipment involved
- Photographs - except those that contain deceased bodies or body parts (case law) or those that show re-creation of the accident
- Transcripts of intracockpit voice recordings (not the actual voice recording)****Unit must request transcript or audio from USACRC/SC CG
- Diagrams
- Maps
- Statistics and data from ORSA that cannot be tied to any particular accident

Requests for Animations/Intracockpit Recordings/Transcripts

- 5 December 2013
- The USACRC produces accident animations (some with audio) on a case-by-case basis for
- the sole purpose of accident prevention under For Official Use Only (FOUO) guidelines within
- the DoD in accordance with AR 385-10, paragraphs 3-10c, 3-28, and 3-29.

Requests for Animations cont.

- Requests for animations must be received from the first General Officer in the Chain of
- Command of the unit requesting the animation and sent directly to the USACRC CG with:
 - a. Name and rank of individual requesting the animation
 - b. What the animation will be used for
 - c. When and where the animation will be used
 - d. Why the animation is needed
 - e. What animation is being requested

NOTE:

Names, SSNs, medical information, etc., that pertain to individuals, or sensitive military information (unit, grid locations) may also be withheld but under completely different statutory authority and not under “safety privilege.”

Freedom of Information Act Release

- CRC does the FOIA release for all Class A-C
 - Safety Office may release Class D...
- Public right to access
 - Withheld “only when it is exempt from mandatory public disclosure”
 - 9 FOIA exemptions
- Initial denial authority (IDA) = CRC CG

FOIA Exemptions for Accident Reports

- Factual portions – publicly releasable
- Exemptions:
 - Deliberative process = Exemption 5
 - Personal privacy = Exemption 6
 - Personnel and medical files
 - Personally identifying info (i.e., SSN)
 - Graphic details and pictures

Release and Use of Reports

- DOD Requests
 - Must state purpose for request
 - Privileged info released solely for accident prevention
 - Factual information released
- Outside DOD
 - Factual information released
 - Basically, same as FOIA release

- Class D & E general use usually releasable in entirety by local installation safety office after consulting with JAG
- Otherwise: Is this for official use within DOD?
- Is this solely for accident prevention purposes?

Releasable?

The board concluded that the gunner was not wearing his gunners restraint at the time of the accident while in the FMTV, M1089 Wrecker. Evidence indicates that the gunner had initially been wearing the Gunners restraint but during the day removed it placing himself at greater risk and leading to his death. The FMTV Wrecker exceeded its towing capacity of 20,000 lbs. As a result, this placed undue stress on the braking system causing a catastrophic failure. The vehicle commander was unsure of the maximum load capacity of his wrecker and therefore exceeded the capabilities. The Platoon Leadership did not conduct an appropriate Risk Assessment before the mission. In this, the Platoon failed to consider the recovery operations and terrain in the event of recovery. The leadership chose to use the same route back to the FOB knowing that the pass was extremely hazardous but failed to consider the wrecker towing the vehicle or an alternate route.

Redacted FOIA Copy...

The board concluded that the gunner was not wearing his gunners restraint at the time of the accident while in the FMTV M1083 Wrecker. Evidence indicates that the gunner had initially been wearing the Gunners restraint but during the day removed it placing himself at greater risk and leading to the catastrophic failure of the Wrecker exceeded its towing capacity of 20,000 lbs. As a result, this placed undue stress on the braking system causing a catastrophic failure. The vehicle commander was unsure of the maximum load capacity of his wrecker and therefore exceeded the capabilities. The Platoon Leadership did not conduct an appropriate Risk Assessment before the mission. In this, the Platoon failed to consider the recovery operations and terrain in the event of recovery. The leadership chose to use the same route back to the FOB knowing that the pass was extremely hazardous but failed to consider the wrecker towing the vehicle or an alternate route.

Other Investigations

Legal Accident Investigation

- Formerly “collateral investigation”
- Purpose: to obtain and preserve evidence for litigation, claims, disciplinary action, or adverse administrative actions
- Required for:
 - Class A mishaps
 - Litigation anticipated
 - Disciplinary action anticipated
 - Probable high public interest

Legal Accident Investigation

- Investigation separate from safety inv.
 - “Conduct independent and apart”
 - “Shall not conduct, review, evaluate, assist with, or maintain files....”
 - Procedures of AR 15-6 and AR 27-20
- Factual, non-privileged portion of safety report may be shared

Other Investigations

- Safety > legal accident investigation or Line of Duty investigation
- Criminal > Safety
 - Removal of evidence
 - Legal chain of custody
 - Access to MP/CID evidence, pictures
 - Criminal intent = cease accident investigation
- Establish contact with MP/CID

Subpoena

- Refer to legal advisor/SJA
- Producing documents
- Serving as an expert witness
- No depositions by investigators
- SJA or HQDA approval required to testify

Conclusion

- Be confident in your knowledge
- Educate your local JAs

Finally...

- When in doubt, CYA...Call Your Attorney! CRC CJA at 334-255-2924
- Jennifer.b.farmer.mil@mail.mil